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NO. 80-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

W. C. McDANIEL, ET AL.,
Petitioners

v.

JOSE SANCHEZ, ET AL.,
Respondents

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that the District Court, after invalidating Kleberg County's existing apportionment of commissioners' precincts, could not assess the constitutionality of and order into effect a new apportionment plan which had not been precleared pursuant to Section 5 of the Voting Rights Act, 42 U.S.C.

1973(c), when the new plan (a) was prepared and presented in response to an order of the District Court, (b) was not prepared by county officials but by a third party expert, (c) was not to be adopted for use by county officials until it had been reviewed, approved, and ordered into effect by the District Court, and (d) had been subjected to an evidentiary, adversary hearing before the court?

PARTIES TO THE PROCEEDING

Petitioners, who were appellees in the Court of Appeals and defendants in the District Court, are W. C. McDaniel (County Judge of Kleberg County, Texas), V. T. Collins, Earl Hubert, and Doyle Dreyer (Kleberg County Commissioners), Ura Dean Ware (Kleberg County Clerk), and J. S. Scarborough III (Kleberg County Sheriff).

Respondents, who were appellants in the Court of Appeals and plaintiffs in the District Court, are Jose Sanchez, Israel Trevino, Natividad De La Rosa and Santos De La Rosa, who sued "on their own behalf and on behalf of all registered voters" and on behalf of all "similarly situated Mexican-American voters residing within County Commissioners' Precincts 1, 2 and 3." (Plaintiffs' First Amended and Supplemental Complaint, paragraphs 19 and 20)

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BRIEF FOR PETITIONERS

OPINIONS AND JUDGMENTS DELIVERED BY THE COURTS BELOW

The following, listed in chronological order, are the pertinent opinions and orders of the trial court and of the United States Court of Appeals for the Fifth Circuit:

(1) The District Court's Memorandum and Order of October 2, 1979, finding a constitutionally impermissible numerical disparity between the four

Kleberg County Commissioners' precincts, finding no dilution of Mexican-American voting strength, and ordering that a new plan be prepared and submitted to the court. (Petition for Certiorari, Appendix, p. A-1).

(2) The District Court's Order, dated January 10, 1980, declaring the new apportionment plan to be constitutionally acceptable, finding that preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973(c), was not required, and directing that the 1980 primary and general elections be conducted thereunder. (Petition for Certiorari, Appendix, p. A-21).

(3) The District Court's Order of January 29, 1980, noting that the Court had "filed an order implementing a new apportionment plan for the 1980 elections" and denying respondents' motion for injunction pending appeal. (Petition for Certiorari, Appendix, p. A-24).

(4) Opinion Order of the United States Court of Appeals for the Fifth Circuit, dated April 14, 1980, holding that the trial court erred in assessing the constitutionality of and in ordering the new apportionment plan into effect without preclearance pursuant to Section 5 of the Voting Rights Act. Reported at 615 F.2d 1023. (Petition for Certiorari, Appendix, p. A-26).

(5) Order of the District Court, dated April 30, 1980, denying respondents' motion to enjoin the conduct of the May 3, 1980 primary election of county commissioners in Kleberg County. (Petition for Certiorari, Appendix, p. A-31).

(6) District Court's Order entered June 20, 1980, directing petitioners to immediately begin Section 5 preclearance procedure pursuant to the Opinion Order of the Court of Appeals. (Petition for Certiorari, Appendix, p. A-34).

JURISDICTION

This Court has jurisdiction to review the opinion of the United States Court of Appeals for the Fifth Circuit pursuant to the provisions of Title 28 U.S.C. § 1254.

The opinion of the Court of Appeals was rendered on April 14, 1980, (Petition for Certiorari, Appendix, p. A-26) and the mandate was issued on April 25. (Petition for Certiorari, Appendix, p. A-30). A petition for rehearing and for rehearing en banc was overruled on May 12, 1980. (Petition for Certiorari, Appendix, p. A-33). The petition for certiorari was filed on August 6, 1980, and was granted on October 14, 1980.

STATUTE INVOLVED

42 U.S.C. 1973(c):

> Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court, appeal to Supreme Court.
>
> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or pre-

requisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure. *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to

enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

As amended Pub.L. 94-73, Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 404.

STATEMENT OF THE CASE

In Texas the Commissioners Court is the governing body of a county. Tex. Rev. Civ. Stats., Art. 2351. It consists of a county judge and four commissioners. Tex. Constitution, Art. 5, § 18. The county judge is elected countywide. One county commissioner is elected from each of four commissioners' precincts into which the county has been divided pursuant to state law, and serves for a term of four years. Tex. Rev. Civ. Stats., Art. 2351. The terms are staggered; two commissioners are elected every two years.

This class action, filed on January 26, 1978, asserted that the populations of the four commissioners precincts of Kleberg County, Texas were so unequal as to violate the constitutional one man, one vote principle and, in addition, that the existing boundary lines of the four precincts divided Mexican-Americans and Anglos in such

a fashion as to unconstitutionally dilute the voting strength of Mexican-Americans. (Plaintiffs' First Amended and Supplemental Complaint, R.__). Among the relief sought in the Prayer was a judgment "granting plaintiffs: . . . (d) the adoption" of a new election plan.

Jurisdiction in the trial court was based upon the provisions of 28 U.S.C. 1343 (3) and (4) which give a United States District Court original jurisdiction of all suits brought pursuant to 42 U.S.C. 1983 to redress deprivation under color of state law of any right, privilege or immunity secured by the Constitution of the United States.

After a trial on the merits the district court concluded that reapportionment was necessary to correct population disparities, but found that there had been no dilution of the voting strength of Mexican-Americans. The court "directed" the defendants* to file and serve upon the plaintiffs by November 13, 1979 a proposed new plan; a hearing on the new plan was scheduled for and conducted on December 10, 1979. (Memorandum and Order of October 2, 1979; Petition for Certiorari, Appendix, p. A-1).

Plaintiffs filed no objection to the order, to the proposed procedure, nor to the reapportionment plan which was served upon them and filed with the court as directed. They appeared for the December 10 hearing prepared to attack the plan with expert testimony challenging the manner in which the plan distributed Mexican-Americans among the four precincts (J.A. 13) and, for the first

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* The parties will henceforth be referred to as they were in the trial court: the petitioners-county officials were defendants and respondents were plaintiffs.

time, orally objected to the plan because it had not been precleared under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c). (J.A. 10, 11)

The evidence heard by the Court on December 10 established that the plan submitted to the Court had been prepared by Dr. Robert T. Nash, Dean of the Business School at Texas A&I University. (J.A. 14) Nash had been given no instructions by the defendants other than that he was to draw commissioners precinct boundary lines which would achieve equality of population. (J.A. 25, 26) He received no directions from the commissioners on boundaries, thoroughfares, ethnic distribution or the like. (J.A. 26, 28-29, 31-32) Their only input was a request that a line be changed so as to include the courthouse and its justice of the peace in a different precinct from the one selected by Nash; the change did not affect population distribution. (J.A. 28)

The testimony of Dr. Nash and County Judge W. C. McDaniel established beyond cavil that the new apportionment plan was not prepared for the purpose of denying or abridging anyone's right to vote on account of race or color. Equal division of the 1970 census population among the four commissioners' precincts, without regard to ethnic ratios, was the sole objective. (J.A. 17-18; 21; 27; 28; 33-35) Although plaintiffs explored the subject carefully with each of these witnesses and their own expert, nothing in the record remotely suggested that the new plan was designed to or did impact adversely on any minority group. (J.A. 43-44; 46)

Dr. Stanley Bittinger, the witness who had analyzed the new plan on behalf of the plaintiffs, testified to facts which demonstrated that the new plan, regardless

of intent, in fact did not dilute or adversely affect minority voting rights. (J.A. 50-68) He compared the ratios of Mexican-American to Anglo populations of the proposed commissioners' precincts with the ratios which existed under the old plan which had been invalidated by the court. (Plaintiffs' Exs. 1 and 2, J.A. 77, 78) His testimony supported the conclusion that compared to the plan previously employed by the county, the new plan did not effect substantial changes in Mexican-American voting strength. Under the old plan, Precinct 4 contained a large Mexican-American majority which was decreased slightly, from 96% to 91%, by the new plan. (J.A. 55; Plaintiffs' Exs. 1, 2, J.A. 77, 78) The Anglo population of Precinct 3 increased from 68% to 76% with a corresponding decrease in the Mexican-American population; in Precinct 2 the Anglo population decreased from 69% to 60% with a corresponding increase in Mexican-American population; and in Precinct 1 the Anglo population increased from 59%to 72% while the Mexican-American population decreased from 40% to 24%. (Plaintiffs' Exs. 1 and 2, J.A. 52, 53-54, 77-78) Bittinger agreed that the proposed change of ratio in Precinct 3 represented what he described as a "slight shift." (J.A. 55-56) He conceded that given the number of Mexican-American residents in Precincts 2 and 3 under the new plan, multiple candidates for county commissioner would necessarily be concerned with soliciting the Mexican-American vote in each. (J.A. 56; 58-59)

Other questions of Bittinger concerning the impact of the new apportionment plan on Mexican-Americans dealt with the size of Mexican-American families (J.A. 61), the number of additional persons who would have reached voting age since the date of the 1970 census upon which

the statistics were based (J.A. 61-63), and demographic changes in the county which had occurred in the ensuing nine years (J.A. 63-65).

It was undisputed that the Commissioners Court had not adopted the plan which Nash prepared, nor otherwise purported to reapportion itself; it had merely voted that the plan be submitted to the Court for its action thereon, as ordered. (J.A. 40) Formulated in December, as it was, the plan was one which the Commissioners Court was prohibited by state law from adopting since it altered the makeup of the county's voting precincts. (J.A. 18, 19); Tex. Election Code, Art. 2.04(1). As the Court of Appeals specifically acknowledged, the Commissioners Court did nothing more than "[review] Dr. Nash's work and officially [adopt] his proposal *as the plan it would submit to the district court.*" (Fifth Circuit Opinion, Petition for Certiorari, Appendix, p. A-27). (Emphasis added).

After considering the evidence offered by all parties, the district court concluded that the new plan remedied the malapportionment previously found. Relying on *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), the court held that the plan was court-ordered rather than legislative and that it was therefore not subject to the preclearance provisions of Section 5 of the Voing Rights Act; it ordered that "the 1980 primary and general elections should be conducted" thereunder. (District Court's Order of January 10, 1980; Petition for Certiorari, Appendix, p. A-23)

Dissatisfied because the trial court did not require preclearance of the plan under Section 5 of the Voting Rights Act, the plaintiffs perfected an appeal to the

Court of Appeals for the Fifth Circuit and, in connection therewith, requested a summary reversal or, in the alternative, an injunction against the conduct of the scheduled May, 1980 election of two county commissioners pursuant to the plan.

In a *per curiam* opinion dated April 14, 1980, a panel of the Fifth Circuit, citing only *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978), and with no mention at all of *East Carroll Parish,* held that the plan was legislative, that it required Section 5 preclearance, and that the "district court erred in considering the constitutionality of the proposed plan." It vacated the trial court's order and remanded the case on April 14, notwithstanding that the primary election was scheduled for May 3. (Fifth Circuit's Opinion; Petition for Certiorari, Appendix, p. A-26)

Defendants promptly moved for a rehearing and a rehearing en banc. While the motion was pending, plaintiffs requested the trial court to enjoin the imminent primary election. The trial court permitted the election to proceed, but enjoined announcement of the results. (Order of April 30, 1980; Petition for Certiorari, Appendix, p. A-31)

On May 12, 1980, the Fifth Circuit denied defendants' petition for rehearing. (Letter Notice; Petition for Certiorari, Appendix, p. A-33) Plaintiffs returned to the trial court once again, this time to seek an order directing defendants to commence Section 5 preclearance procedures immediately. Defendants responded that such an order would render moot their petition to this Court for certiorari. After hearing evidence and argument, the trial court directed defendants to commence preclearance pro-

cedures "immediately." (Order of June 20, 1980; Petition for Certiorari, Appendix, p. A-34)

A requested stay of the Fifth Circuit's mandate was granted by Mr. Justice Powell on August 14, 1980. Thereafter, by agreement of the parties, orders were entered permitting inclusion on the November, 1980 general election ballot of the names of the successful primary election candidates for commissioner and constable, with the proviso that their election to office would be invalidated automatically should this Court affirm the holding of the Court of Appeals. (District Court Orders of September 25 and 30, 1980; R. 8).

SUMMARY OF THE ARGUMENT

From the standpoint of precedent alone, the result in this case is dictated by *East Carroll Parish School Board v. Marshall, supra,* rather than *Wise v. Lipscomb, supra.* In *East Carroll Parish,* this Court held that on facts identical to those here presented, Section 5 preclearance of a new apportionment plan was not required. *Wise v. Lipscomb* is not controlling, both because of the difference in facts and because it was directed to the propriety of the use in a reapportionment plan of at-large or single-member districts rather than the need for Section 5 preclearance. Here the trial court properly distinguished *East Carroll Parish* from *Wise;* the Court of Appeals failed even to discuss *East Carroll Parish.*

Should the Court disregard precedent and undertake a construction of the Voting Rights Act, the result still should be a conclusion that Section 5 preclearance of the plan in question was not required. The trial court was exercising its equitable jurisdiction to provide a prompt

and effective remedy in a suit not based on the Voting Rights Act, in which it had already invalidated the existing plan under which elections in the county might otherwise have been conducted. Since the Act neither speaks to nor contemplates the requirement of Section 5 preclearance under such facts, construction is required. A statute should not be construed to limit the equitable jurisdiction of a court unless it expressly so provides or unless such a construction is a necessary and inescapable inference. Neither situation exists here.

Section 5 should not be construed to require preclearance here because of the absence of a factual circumstance, the assumed existence of which is fundamental to Section 5. Section 5 contemplates the existence, pending preclearance, of a present plan under which elections may be conducted while the preclearance procedure runs its course. It is directed to prospective, voluntary departures from an existing usable plan. Where there is no such plan, no elections can be held until preclearance has been accomplished. Voters are effectively disenfranchised; officials elected under an unconstitutional plan remain in office. This potential for delay and disruption was precluded here. A new, constitutional, and non-discriminatory plan was prepared, reviewed by the court in an adversary proceeding, and ordered into effect within three months. Had the court been required to withdraw from the case after it had determined the existing plan to be unconstitutional, the county might have made Section 5 preclearance procedures a vehicle for indefinite delay and the perpetuation in office of officials elected under the plan which the court had held unconstitutional.

Section 5 was designed to provide scrutiny by a federal authority—to insure a "federal presence"—in the formu-

lation of new voting procedures before they were put into effect, rather than after, and to eliminate after-the-fact, time consuming litigation as the only means of relief. The Act serves these purposes when the plan is voluntary. When the new plan is reviewed and ordered into effect in a pending suit, however, in which the jurisdiction of the court is not dependent on the Voting Rights Act, no further "federal presence" is necessary and the threat of delay is absent. The procedure was not prescribed because local federal district courts lacked the ability or time to search out and eliminate discrimination in new voting plans, but because they usually did not have the opportunity to do so before the new plan had been adopted. Here the district court had that opportunity. A requirement of further scrutiny pursuant to Section 5 would serve no useful purpose, and would lead to the delay the Act was designed to avoid.

Finally, by its very terms the Act does not apply to a plan summoned up, reviewed, and ordered into effect by a federal court. Section 5 prohibits use without preclearance of only those changes in voting procedure which a political subdivision "enact[s] or seek[s] to administer." A county neither "enacts" nor "seeks to administer" a voting plan which it has been *ordered* to use by a federal court.

ARGUMENT

The Court may choose from a number of alternatives in deciding whether a district court, whose jurisdiction has been properly invoked on a basis other than the Voting Rights Act by private citizens who seek an order "granting . . . the adoption" of a new election plan, and

which has struck down an existing apportionment, may assess and order into effect a new plan which has not been precleared under Section 5 of the Voting Rights Act. The Court may follow its own clear holding in *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), that under facts identical to those here present, preclearance is not required. It may select from the variety of rationales represented by the composite majority in *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978), under any of which Section 5 preclearance of the plan in question was not required. Or it may reassess the purpose underlying the enactment of Section 5, which should likewise dictate the conclusion that a new plan, generated under the circumstances here present, is not the type to which the preclearance requirements of Section 5 were directed.

1. ON THE BASIS OF PRECEDENT, SECTION 5 PRECLEARANCE OF THE PLAN WAS NOT REQUIRED

The earliest address by the Court to the question of the need for preclearance of a plan spawned during litigation and the product of a federal court action was *Connor v. Johnson,* 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971). There, the district court had ordered into effect its own election plan. An application that the implementation of the plan be stayed because the plan had not been submitted for Section 5 preclearance was denied with the terse explanation: "A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act." 402 U.S. at 691, 91 S.Ct., at 1762.

The question was next considered in *East Carroll Parish, supra*, in which a police jury and school board, held to be malapportioned to an unconstitutional degree, prepared and filed a reapportionment plan pursuant to court order. The trial court approved the plan as submitted. Dissatisfied parties appealed from that order on the ground that it diluted the black vote. When the case reached this Court the United States filed an *amicus* brief in which it argued that Section 5 preclearance was required before adoption by the district court of a reapportionment plan submitted to it on behalf of a local legislative body that was covered by the Act. The contention was disposed of in the following language:

> [C]ourt-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5. Had the East Carroll police jury reapportioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required. *Connor v. Waller*, 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975). However, in submitting the plan to the District Court, the jury did not purport to reapportion itself in accordance with the 1968 enabling legislation, see n. 2, *supra*, and statutes cited therein, which permitted police juries and school boards to adopt at-large elections. . . . Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under § 5 of the Voting Rights Act, the jury did not have the authority to reapportion itself. * * * Since the reapportionment scheme was submitted and adopted pursuant to court order, the pre-clearance procedures of § 5 do not apply. *Connor v. Johnson*, 402 U.S. 690, 691, 91 S.Ct. 1760, 1761, 29 L.Ed.2d 268, 270 (1971).

424 U.S., at 639 n. 6, 96 S.Ct., at 1085 n. 6 (1976).

Precisely the same circumstances existed in the instant case. When the County's existing plan was struck down, petitioners submitted a plan in obedience to a court order to do so; they did not presume to reapportion the county "on their own authority." And they were prohibited by state law from reapportioning the county in the manner in which it was done, at the time the plan was prepared, since it altered voting precincts in the county (J.A. 18-19). Such changes may be made only during a July or August term. Texas Election Code, Article 2.04(1). The Texas courts have construed this provision to mean that the Commissioners Court has no authority to redraw election precinct boundary lines in any month other than those specified. *Wilson v. Weller,* 214 S.W.2d 473 (Tex. Civ. App. 1948, no writ).

Given the congruence of the facts, a reapportionment plan generated as the one in question was, reviewed and ordered into effect by the trial court, did not require Section 5 preclearance if the pronouncement in *East Carroll Parish* is still the law.

In *Morris v. Gressette,* 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977), additional light was shed on which plans must be precleared and which need not be. The determining factor appeared to be the authority pursuant to which the new plan was adopted:

> This Court held in *Connor v. Waller,* 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975), that reapportionment legislation adopted by the legislature on its own authority in the course of litigation is not effective in a covered jurisdiction until after compliance with § 5's preclearance review provisions. (Such legislation is to be distinguished from a "reapportionment scheme . . . submitted and adopted

> pursuant to court order," for which preclearance is not required. *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 638 n. 6, 96 S.Ct. 1083, 1085, 47 L.Ed.2d 296 (1976).

432 U.S., at 496 n.8, 97 S.Ct., at 2416 n.8. In *Connor v. Waller, supra,* of course, the plan at issue was truly adopted by a legislature which was acting independently, although a court proceeding happened to be pending at the time; it is only in the sense of contemporaneousness that the plan was adopted "in the course of litigation."

The basis for determining the necessity for Section 5 preclearance—the authority pursuant to which the plan was adopted—seemed to be firmly resolved until the decision in *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978). In *Wise* the at-large system of electing Dallas City Council members was held to unconstitutionally dilute Negro voting strength. The City submitted a new plan which called for the election of eight council members from single-member districts and the election at-large of three members, including the mayor. The trial court approved the plan. The Court of Appeals reversed, 551 F.2d 1043 (1977), holding that only single member districts should be employed in what it concluded was a "judicially imposed" reapportionment plan.

Texas was not subject to the Voting Rights Act at the time the case was pending in the trial court, and this Court expressly acknowledged that the question whether the plan required Section 5 preclearance was not present. Since only the permissibility of employing at-large districting was involved, the reasoning of the Court does not resolve the question presented here; and even if it

were pertinent, it would require a conclusion that the county's plan was "court-ordered."

Justices White and Stewart apparently based their conclusion that the plan was legislative on their view that the Dallas City Council had reapportioned itself voluntarily rather than merely submitting the reapportionment plan to the court before adopting it. In the instant case the Commissioners Court did not adopt the plan for implementation but only "adopted (Nash's) proposal as the plan it would submit to the District Court." (Fifth Circuit's Opinion; Petition for Certiorari, Appendix, p. A-27) They likewise placed emphasis on the fact that the Dallas City Council, unlike the *East Carroll* police jury, was not precluded by statute from reapportioning itself. In this respect the instant facts more closely resemble those in *East Carroll Parish* than *Wise* because the Commissioners Court was not free to adopt the plan in question.

In a concurring opinion Mr. Justice Powell, joined by the Chief Justice and Justices Blackmun and Rehnquist, stated that the essential consideration which rendered the Dallas City Council's plan legislative was that "the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than a remedial directive of a federal court." ____ U.S., at ____, 98 S.Ct., at 2501. In the present case it could scarcely be said that a mathematical redistribution of Kleberg County's 1970 census population by a college professor was the exercise of legislative judgment which reflected the policy choices of elected representatives, rather than the remedial directive of a federal court. The trial court had held that there had been

no discrimination or dilution of minority voting strength, but had invalidated the county's existing apportionment because it was not mathematically acceptable. The trial court did not "invite" the submission of a new plan, it "directed" that a plan be prepared and submitted. (District Court's Memorandum and Order of October 2, 1979; Petition for Certiorari, Appendix, p. A-19) It did not leave the matter of whether to implement the plan to the legislative judgment of the county officials, it "ordered" that the 1980 primary and general elections be conducted pursuant thereto. (District Court's Order of January 10, 1980; Petition for Certiorari, Appendix, p. A-23) So, even if the considerations determinative of the permissibility of using at-large districting in a reapportionment plan also determined the need for Section 5 preclearance, it would appear that these four justices who concurred in the result reached in *Wise* that the plan there under consideration was legislative because a product of legislative judgment should agree that the plan in the instant case was court-ordered, and not subject to the requirement of § 5 preclearance.

Finally, Mr. Justice Marshall, joined by Justices Brennan and Stevens, dissented from the majority judgment in *Wise* on the ground that they saw no distinction between the facts there and those before the court in *East Carroll Parish*. They would have held the plan to be court-ordered, and on the same grounds would undoubtedly consider the instant plan court-ordered, contrary to the holding of the Fifth Circuit.

From the standpoint of precedent alone, the trial court here did not err in concluding that because the county reapportionment plan before it was "court-ordered," Section 5 preclearance was not required.

2. PRECEDENT ASIDE, SECTION 5 OF THE VOTING RIGHTS ACT SHOULD NOT BE CONSTRUED TO DEPRIVE A DISTRICT COURT OF JURISDICTION TO REVIEW AND ORDER A NEW APPORTIONMENT PLAN INTO EFFECT WHEN THE PREVIOUS PLAN HAS BEEN INVALIDATED.

a. The purpose and operation of the Voting Rights Act and Section 5

The underlying purpose and history of the Voting Rights Act of 1965, 79 Stat. 437, are treated in detail in *State of South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966); *Allen v. State Board of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed. 2d 1 (1969); and *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978). The Act was amended and extended in 1970, 84 Stat. 314, and again in 1975, 89 Stat. 400.

Racial discrimination in voting was the target of the Act. "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *State of South Carolina v. Katzenbach, supra,* 383 U.S., at 309; 86 S.Ct., at 808. Congressional attempts to cope with the problem by facilitating case-by-case litigation had accomplished little because voting rights suits were onerous to prepare, because the trial process afforded great opportunity for delay, and because when favorable decisions were obtained, certain states simply switched to new discrimina-

tory devices. *Id.*, 383 U.S., at 313-314; 86 S.Ct., at 810-811. The new Act was designed to strengthen existing remedies, to provide additional stringent remedies, and to suspend discriminatory practices such as literacy tests and other voting qualifications. *Id.*, 383 U.S., at 315-316; 86 S.Ct., at 812. To prevent erosion of the progress which *had* been made, Section 5 of the Act "suspend[ed] new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment," a procedure acknowledged to be "an uncommon exercise of congressional power." *State of South Carolina v. Katzenbach, supra,* 383 U.S., at 334; 86 S.Ct., at 822. The prohibition against instituting new voting procedures without approval of a federal authority "is not dependent upon proving past unconstitutional [action]; the Act is aimed at preventing the use of new procedures until their capacity for discrimination has been examined by the Attorney General or by a court." *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 157, 97 S.Ct. 996, 1005, 51 L.Ed.2d 229 (1977).

Two methods of "scrutiny" or preclearance are prescribed by the Act. A covered state or political subdivision may file suit in the District Court for the District of Columbia for a declaratory judgment that the proposed change in procedure is not being enacted for the purpose of racial discrimination and does not have that effect. *Perkins v. Mathews,* 400 U.S. 379, 91 S.Ct. 431, 21 L.Ed.2d 476 (1971); *Allen v. State Board of Elections, supra.* Alternatively, it may submit the proposed plan to the Attorney General, a procedure this Court has concluded was designed to give a covered state "a rapid method of

rendering a new state election law enforceable," *Allen v. State Board of Elections, supra,* 393 U.S., at 549; 89 S.Ct., at 823, because of the provision that the change may be implemented if the Attorney General does not object within a period of sixty days following receipt of all pertinent information. This method of preclearance was added to the Act without mention in committee reports or debates. *Morris v. Gressette,* 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977). Procedure for review by the Attorney General is set out in 28 C.F.R. Part 51.

Although the Attorney General's objection or failure to object to a submitted change is not subject to judicial review, the two methods of preclearance are not mutually exclusive; if the Attorney General objects to a proposed change, the political subdivision may nonetheless seek a favorable declaratory judgment from the District Court for the District of Columbia. *Morris v. Gressette, supra.* The burden of proof in either type of preclearance proceeding is on the political subdivision. *City of Richmond, Virginia v. United States,* 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975). The only penalty for failure to sustain the burden is that the requested change may not be made.

By the express terms of the Act, only a state or a political subdivision may seek a declaratory judgment from the District Court for the District of Columbia that the proposed change has no discriminatory purpose or effect. A private citizen is limited to asking a local district court for a declaratory judgment that a new state enactment is in fact governed by Section 5, and if it is, for an injunction against further enforcement pending the state's submission

of the enactment for preclearance. *Allen v. State Board of Elections, supra.*

The authority of Congress to limit jurisdiction of Section 5 declaratory judgment actions to the District Court for the District of Columbia has been rationalized on the ground that such a suit is a suit against the federal government. *Allen v. State Board of Elections, supra.* That court alone may determine whether a covered change in election laws was enacted for a discriminatory purpose or would have a discriminatory effect. *Perkins v. Mathews, supra.*

Review of a plan by the Attorney General, however, is limited to a determination whether the change will "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). The Attorney General may not determine whether covered changes are constitutional.

The Act specifically provides that even after a favorable declaratory judgment by the District of Columbia Court or approval by the Attorney General, either express or in the form of failure to object, private litigants may still file suit in a local district court to challenge the constitutionality of the precleared plan.

Finally, the Act gives neither the Attorney General nor the District of Columbia federal court jurisdiction to order that specific changes be made or to implement plans of their own. Their function under the Act is solely one of review of what the State elects to submit.

b. Traditional rules of statutory construction do not warrant a conclusion that Section 5 impairs the equitable jurisdiction of a court to provide a complete remedy when it has invalidated an existing apportionment.

Nothing in the language of the Voting Rights Act suggests or requires a holding that when a district court has been asked by private citizens to remedy an unconstitutional election plan presently in use, pursuant to jurisdiction derived by the court from a source other than the Voting Rights Act, the court, in the exercise of its equitable jurisdiction, may not fashion a complete remedy.

The Court is called upon to construe the Act, since the subject at hand lies beyond any direct expression contained in its text. *United States v. Farenholt,* 206 U.S. 226, 27 S.Ct. 629, 51 L.Ed. 1036 (1907). In determining the scope of the Act, the Court may look to the reasons for its enactment. *Stonite Products Co. v. Melvin Lloyd Co.,* 315 U.S. 561, 62 S.Ct. 780, 86 L.Ed. 1026 (1942). The history of the statute, its original purpose, and its current status may be considered; a construction which would frustrate the purpose of the Act is to be avoided. *United States v. Bryan,* 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884 (1950), reh'g. den., 339 U.S. 991, 70 S.Ct. 1018, 94 L.Ed. 1391 (1950). While committee reports may be resorted to, *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed. 726 (1942), they are not binding on the court. See *National Labor Relations Board v. Lion Oil Company,* 352 U.S. 282, 77 S.Ct. 330, 1 L.Ed.2d 331 (1957); *Commissioner of Internal Revenue v. Rabenold,* 108 F.2d 639 (2nd Cir. 1940). The Court is obligated to consider the consequences of varying possible con-

structions, and should adopt the one which will avoid objectionable results. *Brooks v. United States,* 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949).

The sole express support for an argument that the trial court had no power to order a new election plan into effect, under the circumstances here pertaining, is found in Senate Report No. 94-295, U.S. Code Cong. and Admin. News 1975. Commencing at page 784, the Senate Judiciary Committee referred to the holding of this Court in *Connor v. Waller,* 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975), and to the handling of a Section 5 preclearance question in *Gaillard v. Young* (Civil Action No. 74-1265, D. South Carolina, 1975) which involved facts identical to those in this case. The Committee said that in its view, when a federal district court has held unconstitutional an apportionment plan of a covered political subdivision, "the court should defer its consideration of—or selection among—any plans presented to it until such time as these plans should have been submitted for Section 5 review." It construed the opinion in *Connor v. Johnson, supra,* to relate only to plans fashioned by the court itself "because of exigent circumstances." The holdings in these cases were deemed by the Committee to be "consistent with the Committee's objective to utilize a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia District Court." Neither the report of the House Judiciary Committee, Report No. 94-196, May 8, 1975, nor any of the myriad other House or Senate committee reports published from the inception of the Act in 1965, through its extension in 1970, to the present, contains language suggesting such a result.

Notwithstanding the quoted language and construction *cum* legal opinion, the Act does not, by plain words or necessary inference, purport to divest a local federal district court of jurisdiction to formulate a complete remedy, once its jurisdiction has been invoked in the first instance on a basis other than the Voting Rights Act, and a solitary committee report cannot mandate that which the language of the Act does not.

Porter v. Warner Holding Co., 328 U.S. 396, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) delineates the equitable jurisdiction pursuant to which the trial court below was authorized to and did act. After noting that the court's jurisdiction had been invoked to grant injunctive relief, this Court stated:

> Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Virginian Ry. Co. v. System Federation, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789. Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.' *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 592, 88 L.Ed. 754. . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever issues and give whatever other relief may be necessary under the circumstances.
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> * * *

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative demand. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.' Brown v. Swann, 10 Pet. 497, 503, 9 L.Ed. 508. See also Hecht Co. v. Bowles, supra, 321 U.S. 330, 64 S.Ct. 592.

328 U.S., at 398; 66 S.Ct., at 1089.

Included within the equitable jurisdiction which is not to be denied a district court absent the clarity or inescapable necessity spoken to, is the duty to enter a decree which will prevent a multiplicity of actions, *Joseph Parker Kemp v. Boyd,* 229 U.S. 530, 33 S.Ct. 785, 57 L.Ed. 1317 (1913), one which will completely determine the controversy before the court. *Stonega Coke & Coal Co. v. Price,* 116 F.2d 618 (4th Cir. 1940), *cert. den.,* 308 U.S. 618, 60 S.Ct. 263, 84 L.Ed. 516 (1939). "The approved policy in equity cases is to settle all the rights of the several parties. *Riddle v. Mandeville,* 5 Cranch 322, 3 L.Ed. 114." *National Cash Register Co. v. Dallen,* 76 F.2d 867, 868 (3rd Cir. 1935).

These principles were applied in factually analogous circumstances in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). School authorities had argued that the equity powers of federal district courts had been limited by Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c, Section 2000c-6 of which provided "nothing herein shall

empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to ensure compliance with constitutional standards." This Court said there was no suggestion in the statutory language of an intention "to restrict those powers or withdraw from courts their historic equitable remedial powers." 402 U.S., at 17, 91 S.Ct., at 1277. There is nothing in the Voting Rights Act which suggests an intention to restrict the power of a local district court to review and order into effect a plan designed to remedy constitutional defects in and to supplant an existing plan which the Court has held may be used no longer.

As hereafter demonstrated, a construction of the Act in a manner which would divest the district court of jurisdiction to order a new apportionment plan into effect, given the present circumstances, is inconsistent with a basic presumption upon which the Act is based, and would thwart rather than further the objectives of the Act.

c. Section 5 is directed to voluntary changes in voting procedures, during the preclearance of which a present election plan remains in effect.

A principal reason for construing Section 5 not to apply to a plan developed under the present circumstances lies in congressional and court statements reflecting the assumption of a fact not present here—the existence of a currently usable plan. The assumption is expressed in

terms of "freezing": "[Section 5] of the Voting Rights Act essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without discriminatory purpose or effect." *Georgia v. United States,* 411 U.S. 526, 538, 93 S.Ct. 1702, 1709, 36 L.Ed.2d 472 (1973). *Beer v. United States, supra,* refers to the same "freezing" concept as expressed in a committee report:

> Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be non-discriminatory.' H.R. Rep. No. 94-196, pp. 57-58.

425 U.S., at 140; 96 S.Ct., at 1363.

Existing election procedures cannot be frozen in effect where, as here, a local federal court with unquestionable jurisdiction of the matter has already told the county it may no longer use the existing election plan.

No particular mischief or hardship results from construing Section 5 to prohibit the *voluntary* employment of a new voting plan until it has been precleared, because the political subdivision may continue to hold elections under an old plan during the pendency of the preclearance procedure. Continued use of the old plan does not constitute the retrogression which Section 5 was designed to prevent, and pursuit of preclearance, even in a District of Columbia court, would not interfere with the conduct of statutorily scheduled elections. Where the old plan no longer exists, however, different results accrue. The rights of the voters, minorities included, are not just

subject to retrogression, they are denied completely during the time it takes to preclear the proposed plan.

A political subdivision which voluntarily undertakes enactment of a new plan does not run the risk of disenfranchising its residents during any prolonged period of preclearance, but a county whose plan has already been struck down does. And where, as in Texas, present county commissioners continue to serve until their successors are duly elected, Tex. Constitution, Art. 5, § 18, a political subdivision may perpetuate indefinitely the tenure of officials elected pursuant to an unconstitutional plan if the local court must remit the subdivision to the delay which preclearance under the Voting Rights Act makes possible.

To this suggestion might come the response that both a Senate committee and this Court have recognized the authority of the trial court to order a plan into effect without preclearance, under exigent circumstances. But from whence in Section 5 does such jurisdiction derive? The Act is silent on the subject. Either the Act leaves the court no jurisdiction to order the county to administer *any* new plan which has not been precleared, including one prepared by the court, or it does have jurisdiction to forego preclearance when there is no other useable plan. The Act does not lend itself to a construction that the district court has a sort of partial jurisdiction.

Is the question then not one of jurisdiction, but of abuse of discretion? If it is, there certainly was no abuse of discretion by the trial court under the facts here applicable.

If the court may order a temporary plan into effect to meet the exigencies of the moment, may it be a plan

prepared by the county and only reviewed by the court? Without preclearance? Or must the court roll up its robe sleeves and draft the interim plan from scratch to avoid the need for preclearance? Or may the county submit an almost but not quite perfect plan which, when corrected in small detail by the court, may be used because it is thereby the court's and not the county's?

The possibilities are countless and avoidable if Section 5 is given the practical construction that a plan such as the instant one need not be precleared.

d. Requiring Section 5 preclearance when the trial court has invalidated an existing plan will permit rather than prevent delay in achieving constitutional apportionment.

The suggestion that requiring Section 5 preclearance will expedite rather than delay the adoption of a new voting procedure has verity when the new procedure is a voluntary one, one which the political subdivision *desires* to make. It is a slower process, though, when the subdivision is already in litigation, and it may be made a device for delay, if the subdivision wishes.

In the instant case, the new apportionment plan was prepared, presented, scrutinized in an adversary hearing, and ordered into effect within three months of the time the old plan was struck down. Such a prompt remedy was possible because the trial court was already familiar with the underlying facts, had control of the parties, and established a brisk schedule.

Compare that dispatch with the delay the Voting Rights Act makes possible to a political subdivision so inclined, if the trial court were required to withdraw

once it had held the existing plan unconstitutional. Officials with whom the subdivision is satisfied, frequently defendants themselves, elected under an unconstitutional plan, remain in office until a new plan has been precleared. There is no previous plan frozen into effect pending preclearance. Knowing that delay will perpetuate them in office, they submit an artfully unacceptable plan to the Attorney General. Upon rejection, the plan might be revised and resubmitted in a still unacceptable form. When rejected again, suit could be filed in the District of Columbia court, since Attorney General denial of preclearance does not preclude a subsequent suit in the District of Columbia for approval of the same plan. If resort to the District of Columbia court is the route chosen by the county, then there arises that multiplicity of suits which the rules of statutory construction and the equitable jurisdiction of the court should avoid. Appeal to the Supreme Court might follow. These peregrinations are possible because neither the Attorney General, nor, apparently, the District Court for the District of Columbia, has authority under Section 5 to do more than disapprove.

Once precleared by either method the plan then might be attacked by private citizens in the local district court on the grounds of unconstitutionality. Should the local district court determine the new, precleared plan to be unconstitutional, then the same time-consuming preclearance procedures would commence all over again.

To this scenario the response might be that the trial court (local or District of Columbia?) has authority to enter orders to expedite the county's pursuit of preclearance, or to order a temporary plan into effect. What a wasteful, needless procedure, compared to what occurred here. And in implementing even a temporary plan, if it

needed to, could the trial court employ one prepared by the county but not precleared?

In short, construction of the Voting Rights Act to require Section 5 preclearance of a plan prepared at the instance of and reviewed by a local district court, when there is no usable existing plan, would make possible those consequences which the Court could and should avoid by a contrary construction. *Brooks v. United States, supra.*

e. "Legislative" or "court-ordered": Section 5 only speaks to voluntarily enacted and implemented election plans.

Justice Frankfurter observed that: "[T]he phrase . . . is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." *Tiller v. Atlantic Coastline R. Co.*, 318 U.S. 54, 68, 63 S.Ct. 444, 452, 87 L.Ed. 610 (1942). So it also is with labels. Section 5 applicability cannot be determined by resort simply to cases in which plans have been labeled "court-ordered" or "legislative," for these terms have been employed most frequently in cases in which the issue was the substantive acceptability of a reapportionment. *E.g., Wise v. Lipscomb, supra; Chapman v. Meier,* 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1977); *Mahan v. Howell,* 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). Plans prepared by a court are subject to stricter requirements as to equality of population distribution and the use of single member districting, than are "legisla-

tive" plans. *Chapman v. Meier, supra; Connor v. Finch,* 431 U.S. 407, 414, 97 S.Ct. 1828, 1833, 52 L.Ed.2d 465 (1977).

The same plan may be "legislative" for substantive purposes, but "court-ordered," in the *East Carroll Parish* sense, when the need for Section 5 preclearance is the inquiry. If the issue before an appellate court is the permissible disparity in division of population, or whether single member or at-large districts may be used, the inquiry is whether the disparity of population or the choice of districting represents a policy decision permitted to a political subdivision but not to a federal court. When the issue is the need for Section 5 preclearance, the primary concern is whether the plan requires federal scrutiny to insure the absence of retrogression or discriminatory purpose and effect. If a plan has already been reviewed and ordered into effect by a federal authority, a district court which has properly acquired jurisdiction, it is "court-ordered" and Section 5 preclearance should not be required.

A report accompanying the five-year extension of the Voting Rights Act in 1970 explained:

> Section 5, similar to the authority to assign examiners and observers, assures a Federal presence and provides an important safeguard that new subterfuges will be promptly discovered and enjoined.

House Report No. 91-397, U.S. Code and Cong. Admin. News 1970, p. 3284.

When a plan is conceived pursuant to a court order and review, the necessity for the "federal presence" referred to is obviated. There is no need for a second

federal presence. The function contemplated to be served by Section 5 has already been performed. Any new subterfuge will be more "promptly" discovered and enjoined by the court in which the action is already pending.

In a different respect, whether a plan is literally "court-ordered," whether physically prepared by the court or not, has true significance in determining the applicability of Section 5 to a plan such as Kleberg County's. The Act only requires preclearance of those changes in procedure which a political subdivision "enacts or seeks to administer." These terms connote voluntary changes.

The term "enact" means "to make into law." Webster's Third New International Dictionary (1966). The county did not make into law the plan it was ordered to employ by the court. The court did that. The county was required to conduct elections pursuant to the plan ordered into effect by the court, without regard to whether it followed the formalities of enactment. In the sense of Section 5, the court "enacted" the change.

The synonym for the word "seek," when used with an infinitive such as "to administer," is "try." Webster's Third New International Dictionary (1966). The county did not *"try* to administer" the new plan which had been reviewed by the trial court, it was ordered to administer it.

Consistent with this reasoning, a House committee explained that Section 5 "deals with *attempts* by a state or political subdivision . . . to alter by statute or administrative acts voting qualifications and procedures in effect on November 1, 1964." H. Rep. No. 439, U.S. Code Cong. and Admin. News 1965, pp. 2457. A county which is *ordered* to prepare and implement a new plan

is not "attempting" to alter voting procedures as that word is employed in the report.

This Court's analysis of the Voting Rights Act also supports the conclusion that the preclearance provisions of Section 5 were directed to changes instituted by political subdivisions of their own volition:

> The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment * * * Congress knew that some of the States covered by Section 4(b) of the Act *had resorted* to the extraordinary strategem of contriving new rules of various kinds *for the sole purpose* of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States *might try* similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner. * * * The Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension. A State or political subdivision *wishing* to make use of a recent amendment to its voting laws therefore has a concrete and immediate 'controversy' with the Federal Government. (Citations omitted) An appropriate remedy is a judicial determination that continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment. (Emphasis supplied)

State of South Carolina v. Katzenbach, supra, 383 U.S., at 334-335; 86 S.Ct., at 822.

The voluntary stratagems, purposes and maneuvers which the Court said preclearance was designed to pre-

vent are not present in a plan prepared under the practised eye of a federal court, especially when that eye already has been sharpened by scrutiny of the facts and circumstances on which the invalidation of the subdivision's existing plan is based and from which the need for a new plan arises. It was not Congress' concern that federal district courts were not qualified to purge new election plans of unconstitutional effects; its concern was the delay which would ensue if litigation were the *only* method available. That this is so is evidenced by an expression in a 1970 House Committee report which dealt with whether the Voting Rights Act should be extended:

> Failure to continue this provision . . . would . . . restore time-consuming litigation as the principle means of assuring the equal right to vote.

House Rep. No. 91-397, U.S. Code and Cong. Admin. News 1970, p. 3284.

Had Congress intended to require Section 5 preclearance of *any* new election procedure regardless of its derivation or the authority pursuant to which it was to be implemented or that it had already received federal scrutiny, it would have been a simple matter for it to have said so in those words. It chose instead to limit the requirement of preclearance to changes which a political subdivision "enacts or seeks to administer." The scope of the Act should not be extended to plans of the type at hand, when to do so would delay rather than expedite the substitution of a constitutional plan for an unconstitutional one, and would impair the equitable jurisdiction of the district court under circumstances which do not call for such a result. *Porter v. Warner Holding Co.*, 328 U.S. 396, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946).

CONCLUSION

For the reasons discussed, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November _____, 1980, three copies of the foregoing Brief for Petitioners and of the accompanying Joint Appendix were served upon respondents by depositing the same in the United States Post Office, first-class postage prepaid, addressed to Mr. Bob Parmley, Texas Rural Legal Aid, Inc., 504 Sidney Baker Street, Kerrville, Texas 78028, their attorney.

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